

VICTOR CONTRACTING CORP.
and
DICKENSON COUNTY, VIRGINIA

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 92-288

Decided November 5, 1996

Appeal from a decision by Administrative Law Judge David Torbett, vacating Notice of Violation Nos. 91-13-289-1 and 91-13-299-1, and Cessation Order No. 91-13-299-1. Hearings Division Docket Nos. NX 91-22-R, NX 91-23-R, NX 91-25-R, and NX 91-26-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977:
Applicability: Generally--Surface Mining Control and Reclamation Act of 1977: Exemptions: Incidental to Government-Financed Construction

To qualify for a 30 U.S.C. § 1278(3) (1994) and 30 CFR 700.11(a)(3) exemption from SMCRA performance standards, the coal must be extracted as an incidental part of Federal, State, or local government-financed highway or other construction. Extraction of coal was found necessary as an incidental part of government-financed construction from an engineering standpoint, and not for the purpose of financing the construction, when the preponderance of the evidence indicated that removal of the coal was necessary to create a stable foundation for landfill expansion, to prevent groundwater contamination, and to have the base of the expanded waste storage area at an elevation which was lower than the base of the existing landfill.

2. Surface Mining Control and Reclamation Act of 1977:
Applicability: Generally--Surface Mining Control and

Reclamation Act of 1977: Exemptions: Incidental to
Government-Financed Construction

The criterion for government-financed construction, for the purposes of exemption from SMCRA performance standards pursuant to 30 U.S.C. § 1278(3) (1994) and 30 CFR 700.11(a)(3), was met when the preponderance of the evidence demonstrated that a county landfill construction, which involved incidental coal removal, was funded entirely with public funds.

APPEARANCES: J. Nicklas Holt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement; Walton D. Morris, Jr., Esq., Charlottesville, Virginia, for Honey Camp Concerned Citizens Group; Elsey A. Harris III, Esq., Norton, Virginia, for Victor Contracting Corporation.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed a January 7, 1992, decision by Administrative Law Judge David Torbett vacating Notice of Violation (NOV) Nos. 91-13-289-1, 91-13-299-1, and Cessation Order (CO) No. 91-13-299-1 issued jointly to Victor Contracting Corporation (Victor), and Dickenson County (the County), Virginia. 1/

Background

On February 8, 1990, OSM's Branch of Fee Compliance Audit sought to determine whether Victor's removal of coal from the Honey Camp Concerned Citizens Group (Honeycamp) landfill, operated by the County, was exempt from the surface mining laws pursuant to section 528(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1278(3) (1994). This provision exempts "the extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction, under regulations established by the regulatory authority" from the operation of SMCRA.

OSM Inspector Arnett inspected the site, and on March 21, 1990, he issued Ten-Day Notice No. X-90-13-289-1 to the Virginia Division of Mined Land Reclamation (DMLR), advising DMLR that the County and its contractor Victor were operating a surface coal mine without a valid permit

1/ Both Victor and the County filed Applications for Review and the four cases (Nos. NX 91-22-R, NX 91-23-R, NX 91-25-R, and NX 91-26-R) were consolidated by Judge Torbett.

(Exh. R-5). In its response, DMLR reported its finding that the coal removal was necessary for landfill construction and exempt from SMCRA (Exhs. R-21, R-26).

When OSM advised DMLR that it deemed this response inappropriate, DMLR sought informal review pursuant to 30 CFR 842.11(b). By letter dated December 21, 1990, OSM's Deputy Director, Operations and Technical Services, notified DMLR that the coal removal at the landfill was not exempt. The Deputy Director stated that the extraction must be limited to the area directly affected by the government-financed construction and limited to extraction necessary to enable construction. He stated further that OSM did not consider the area to be directly affected by other government-financed construction because coal had been extracted from an area outside the boundaries of the existing landfill permit, and he ordered a Federal inspection (Exh. R-19).

During the course of a January 7, 1991, Federal inspection of the mined site, Arnett issued NOV No. 91-13-289-1, citing Victor and the County for four violations of Federal regulatory standards (and Virginia counterparts) relating to highwalls, spoil piles, surface drainage, and effluent limitations (Exh. R-15). 2/ OSM Inspector Virts reinspected the site on January 22 and 24, 1991, and issued NOV No. 91-13-299-1, citing Victor and the County with violations of 30 CFR 842.13(a)(2) and (3) for refusal to allow him access to blasting records (Exh. R-1). On January 29, 1991, Virts issued CO No. 91-13-299-1 for failure to abate violation No. 1 of NOV No. 91-13-299-1, i.e., the failure to allow access to records (Exh. R-2).

Victor and the County filed independent petitions for review and temporary relief. A hearing on one of the temporary relief petitions was held before Judge Torbett in Knoxville, Tennessee, on February 5 and 13, 1991. 3/ The parties then took several depositions and entered stipulations to the record for all four cases. Judge Torbett issued his decision on January 7, 1992.

Evidence

Willie M. Clisso, Victor's Chief Engineer and Manager, testified that the County had contacted him and asked him to submit a plan to produce cover soil and extend the life of the existing landfill, which was not then in compliance with Virginia waste management regulations (Tr. 38, 42-46). Clisso recommended expanding the existing landfill by excavating

2/ The NOV cited violations of 30 CFR 816.102(a), (b), (f), (k), and 816.106(a) and (b) (failure to eliminate highwalls, spoil piles, and depressions); 30 CFR 816.45 and 816.46(b)(1), (2) (failure to pass surface drainage through a siltation structure); 30 CFR 816.42 (discharging water exceeding maximum effluent limitations); and 30 CFR 816.107(b)(1) (placing spoil on downslope).

3/ On July 9, 1991, Honeycamp was granted intervenor status.

to the Gladeville Sandstone formation in an area called the "finger ridge," to provide needed cover soil and form a bowl for a new solid waste liner system (Tr. 46). 4/

On March 30, 1989, Victor and the County entered into a contract to excavate the finger ridge area to the upper contact of the Gladeville Sandstone formation. Paragraph 5 of the contract provided that Victor would be paid "based on the actual costs incurred * * * plus 15%" (App. Exh. 3). In a separate letter to the County Board of Supervisors with the same date, Clisso stated that Victor had evaluated the project and would "guarantee that the funds generated from coal removal will be sufficient to cover all the costs of removal of the [finger ridge], segregation of material and establishment of the pit areas for refuse" (Exh. R-3; Tr. 125). The fact that coal revenues might be insufficient to cover the project costs was a business risk freely undertaken by Victor in anticipation of additional revenues from landfill construction (Tr. 135, 139).

In a May 8, 1989, letter, Victor advised DMLR that it had entered into a contract with the County to furnish cover soil to cover ongoing waste deposition and extend the life of the Honeycamp landfill. Victor set out four phases of planned construction. Phase 1 was described as removal of the finger ridge area and construction of a pit. Victor noted that it anticipated that approximately 10,000 tons of coal would be recovered from a seam which had been previously deep and auger mined, and stated that the "[c]oal is an aquifer and must be removed from the disposal area." DMLR was advised that proceeds from sale of the removed coal "will be paid to the Dickenson County General Fund." Phase 2 was the reclamation of the existing landfill area by covering it with 3 feet of cover soil removed from the finger ridge and seeding it. Phase 3 would be to permit the areas adjacent to the existing landfill, including the finger ridge area, to comply with newly enacted and more stringent 1988 Virginia Department of Waste Management regulations. Phase 4 would be construction and installation of a liner allowing for 6 acres of solid waste storage, with an anticipated life of from 10 to 15 years. The projected cost of excavation and construction was \$3,349,973, and the anticipated income to the County from coal sales was \$220,000 (App. Exh. 3).

Clisso stated that excavation of the finger ridge was the only viable alternative for producing cover soil and extending the life of the existing landfill (Tr. 68, 142-43). Clisso testified that the integrity of the coal had been destroyed by prior underground mining, and Victor's machinery regularly broke through the overburden into old mine workings (Tr. 71). He found the coal seam to be unsatisfactory as a foundation base for the landfill, and completely unstable (Tr. 71, 77-78). He testified that 22,000 tons of coal were removed and sold in the name of the County

4/ According to a sketch submitted to DMLR, the existing landfill area is in the shape of a "U" and the finger ridge is the area within the "U." See App. Exh. 3.

(Tr. 53, 60, 62), with coal removal being completed by October or November 1989 (Tr. 154). Clisso explained that, when approximately 90 percent of finger ridge had been excavated in early 1990, Victor submitted a leachate control plan to the Department of Waste Management and began construction of a drainage system to dry the area and prevent groundwater contamination (Tr. 75-77). During the course of this construction Victor encountered a previously unknown unlicensed asbestos dump which had been buried at the site. 5/ Clisso explained that this encounter caused the plans for extending the landfill into the area to be shelved (Tr. 73-75).

Clisso stated that, under the original wastefill expansion plan, removal of the coal was "absolutely" necessary for extending the capacity of the landfill, because coal, an aquifer, does not form a good seal and is not a stable base (Tr. 77-78). Clisso was of the opinion that the finger ridge was within the "permit boundary," although it had not yet been designated as a disposal area (Tr. 78). Clisso characterized the situation at the landfill in March 1989 as an emergency because there was not sufficient available cover material to cover the garbage prior to Victor's involvement (Tr. 88-89). He explained that the finger ridge was within the County's permit area, but the County had not submitted an application for an amendment to its permit to expand the disposal area to include the finger ridge, because the previously mined coal seam was an unstable foundation for the landfill (Tr. 77-78), and, therefore, the finger ridge would not qualify as a waste disposal area until after the coal had been removed. He noted that the County had planned to apply for a permit amendment to designate the finger ridge as a disposal area until asbestos was discovered (Tr. 89, 91). Victor had considered the feasibility of establishing a new landfill at another location and concluded that it could have cost the County an additional \$2,000,000 in site preparation and geotechnical studies. Clisso explained that there was simply no feasible option for expanding the existing landfill, other than removing the finger ridge (Tr. 100-104).

Ira Sullivan, Chairman, Dickenson County Board of Supervisors, testified that the County received "a little over \$500,000" from the sale of the coal (Tr. 171). He noted that by January 1991, the County had spent a total of \$1,299,471.83 on the landfill, of which \$501,289.93 was paid to Victor (Tr. 167; App. Exh. 17). Sullivan testified that the only way "removal of the ridge" could have been funded was to pay for it from coal receipts, and it was in fact paid for out of county general funds (Tr. 178). Sullivan further testified that the Board of Supervisors had been told by engineers that it was necessary to remove the coal to complete the project (Tr. 181).

Ernie Barker, Reclamation Services Manager for DMLR, testified that DMLR deemed the coal removal to be incidental to the landfill project

5/ The asbestos had apparently been removed from schools in the area and buried on the site in 1985. See Deposition of Freddie Boyd.

and granted an exemption. DMLR considered the project to be 100-percent government financed (Tr. 201-02), with funding for the project coming from the County budget (Tr. 230). Accordingly, DMLR found the landfill to be in compliance with the 50-percent government-funding requirement of the regulation (Tr. 206). Barker also testified that it was necessary to remove the coal to complete the project, avoid subsidence, and achieve a stable level of compaction (Tr. 212, 217). He stated: "I didn't have a staff engineer that would certify the integrity of a fill on top of an area that had been mined" (Tr. 212). Barker considered the expansion of the landfill and coal mining to be "one project." He stated that the applicable regulations, as of May 1989, did not require separate permitting of a new borrow area (Tr. 226).

In a May 21, 1990, letter from the Commissioner DMLR to OSM's Field Office Director, the Commissioner took exception to OSM's position that the exemption criterion was not met under the applicable Virginia Coal Surface Mining Regulations (Exh. R-4). The Commissioner gave the following explanation of how the project was funded:

Monies for this project were not appropriated up front because[,] according to the County Administrator, the cost is so high that it has to be budgeted over several fiscal years. OSMRE is taking the stance that the project has not been 50 percent government financed. The project is far from completed, however, all funds used and received in this project are county government funds. There is no private money or other outside investment.

* * * * *

With respect to the funding issue, public funds from general revenues have been appropriated for this project. The contractor received compensation based on the actual cost of work performed.

There was no royalty or other type of incentive to the contractor to remove coal. This transaction is not a veiled attempt to circumvent the Surface Mining Regulations or avoid the permitting process and regulatory oversight. Expansion of the landfill and the contract between Dickenson County and Victor Contracting appears to be an arms length transaction.

All revenues used to pay Victor came from the County's general revenue fund. All revenues received from coal sales of county-owned coal went into the county general revenue funds. Victor received its actual cost for completing landfill work, not a royalty or percentage of coal for its work. All excess monies received as a result of sale of county coal were retained in the Dickenson County general revenue fund. There was no in-kind exchange or other impermissible financing.

The issue seems to be that a specific allocation does not appear in the county budget for this work. However, public monies from Dickenson County general revenues have, in fact, been used to pay the contractor to improve the County landfill. Payment to Victor Contracting was approved by the Dickenson County Board of Supervisors, otherwise no monies would have been tendered by the County to the contractor.

Dickenson County plans to spend in excess of three million additional dollars to upgrade and permit their landfill.

Dickenson County derived approximately five hundred twenty-five thousand dollars from coal sales. Victor Contracting was paid approximately five hundred thousand dollars. This clearly is not an in-kind contract. There is no dispute that all monies are local government monies and came from the general fund.

Henry Allen Vanover is administrative assistant to the County Board of Supervisors. He testified that his responsibilities include supervising the County landfill, and the finger ridge project was undertaken to fill the urgent need for cover material to place on garbage and the need for additional storage space (Tr. 242). He stated that the finger ridge area was "within our leased boundary and within our permit area" (Tr. 249) and that \$1,299,471.83 was spent to extend the landfill (Tr. 253; App. Exh. 17). He also testified that \$525,519.16 in coal receipts had been received in his office and deposited in the general fund (Tr. 257).

Michael J. Superfesky, OSM civil engineer, testified that removal of the coal "would have been one of the options for stabilization of the foundation" but it was "not absolutely totally necessary" to remove the coal to extend the landfill (Tr. 296-97). He conceded, however, that he had not studied double liner landfills or the regulations governing waste disposal in Virginia (Tr. 292, 296). Superfesky thought that there should have been an evaluation to determine whether the mined out areas in the coal seam could have been filled or the material could have been compacted or crushed before undertaking what he described as a long-term, multi-million dollar project (Tr. 295, 297-98).

William W. King, a consulting engineer with substantial landfill experience, testified that the County's permit for the landfill (App. Exh. 29-A), included the finger ridge (Tr. 301). He stated that the only feasible alternative for extending the landfill "was to remove the finger ridge and to pursue lateral and vertical extensions of the landfill * * * and eventually wrap the landfill around the bench that exists now" (Tr. 304). He explained that this expansion was ultimately blocked when the asbestos was found, because the regulations require the asbestos to be covered by a 3-foot layer of soil (Tr. 305). King gave four reasons he deemed removal of the coal necessary: (1) stability, referring to a 1988 Solid Waste Management regulation requiring a geologically stable area for a landfill

site (Tr. 308), (2) the regulatory requirement calling for a 5-foot separation between solid waste and groundwater, (3) the base of a new landfill should not be above the base of an old landfill, and (4) removal of the coal was cost-effective because it created an additional volume available for landfill (Tr. 306-07).

Decision Below

In his January 7, 1992, decision Judge Torbett cited 30 U.S.C. § 1278(3) (1994) and the pertinent regulation, 30 CFR 707.5, as the basis for his finding that all three criteria had been met, and Victor's coal removal for the County was outside OSM's jurisdiction, and the NOV's and CO issued by OSM invalid.

Arguments on Appeal

OSM contends that Victor and the County did not demonstrate entitlement to an exemption, asserting that appellees "admitted that they conducted the excavation for the purpose of obtaining coal" (OSM Brief (Brief) at 21). According to OSM, the testimony of the "only qualified engineers" shows that coal removal was cost effective, but not necessary from an engineering standpoint. Arguing that the coal revenue was "absolutely essential" to the project, OSM states that the extraction of the coal was not an incidental action, which is a prerequisite for an exemption (Brief at 24-25). OSM cites the King and Sullivan testimony to support of its argument.

OSM notes Judge Torbett's extensive review of the engineering justifications for coal removal, arguing this demonstrates his having ignored the financial necessity. OSM argues that engineering necessity is controlling, and when coal removal is financially necessary, the fact that coal "removal may be justifiable on engineering grounds" does not render the removal for economic purposes "incidental" (Brief at 26-27).

OSM further argues that "[a]ppellees failed to show that the project was properly financed" (Brief at 28). Although tendering nothing in the way of evidentiary or legal proof, OSM speculates that the County violated Virginia budgetary statutes because it made no plans for and did not appropriate funds for the project, failed to show that the funds paid to Victor came from an appropriated budget, and failed to show that the project was at least 50-percent government funded. OSM focusses on the testimony of Ira Sullivan who, when asked whether the County had appropriated money for the landfill expansion, stated that "the only way * * * we [were] going to pay for [removal of the finger ridge, was] from what coal we got" (Tr. 178). OSM asserts that this admission was not contradicted by anyone and that, under applicable precedent, where coal removal is used to pay for the construction project, such a project cannot be exempt from SMCRA.

OSM argues that the payment to Victor was, essentially, an "in kind" payment proscribed by the regulation and that the consideration of the landfill expansion and closure as one "project" is an unreasonably broad interpretation of the term "construction" in the regulation against which the 50-percent funding criterion is to be measured. Rather, OSM suggests the project should be regarded as limited to removal of the finger ridge, generation of cover material, and preparations to expand the landfill (Brief at 31-32).

Neither Victor nor the County submitted a responsive pleading. Honeycamp has filed a brief agreeing with "the factual statements, arguments, and authorities advanced in OSM's opening brief." In addition to those arguments, Honeycamp asserts that coal removal was not incidental because it occurred outside the lawful boundaries of the construction project in question (Brief at 3). Honeycamp cites a regulation promulgated by the Virginia Department of Waste Management (VR 672-20-10 § 7.0(C)(2)) as requiring the issuance of a new permit when there is "[a]ny expansion of the disposal area from that specified in the permit of an existing solid waste management facility." Honeycamp contends that Judge Torbett erred in concluding that, notwithstanding his finding that neither Victor nor the County applied for or obtained a new permit for expanding the landfill area, the County had met the boundary requirement (Brief at 4-5).

[1] As noted previously, Judge Torbett relied upon 30 U.S.C. § 1278(3) (1994) and 30 CFR 707.5 as the basis for his decision. These provisions delineate three requirements for an exemption from the operation of SMCRA when the removal of coal is an incidental part of government-financed construction.

First, the extraction of coal must be "an incidental part" of Federal, State or local government-financed highway or other construction. "An incidental part" is defined in 30 CFR 707.5 as

the extraction of coal which is necessary to enable the construction to be accomplished. For purposes of this part, only that coal extracted from within the right-of-way, in the case of a road, railroad, utility line or other such construction, or within the boundaries of the area directly affected by other types of government-financed construction, may be considered incidental to that construction. Extraction of coal outside the right-of-way or boundary of the area directly affected by the construction shall be subject to the requirements of the Act and this chapter.

Second, "Government financing agency" is defined as a "Federal, State, county, municipal, or local unit of government, or a department, bureau, agency or office of the unit which, directly or through another unit of government, finances construction."

Third, "government-financed construction" means the construction must be funded "50 percent or more" by funds appropriated from the government financing agency's budget.

Incidental extraction of coal is the extraction of coal necessary to enable the construction of another project. The "necessity" under this definition is a function of engineering, not cost constraints. Wilder Coal Co. v. OSM, 112 IBLA 107, 112 (1989); Concord Coal Corp., 3 IBAMA 92, 98, 88 I.D. 456, 459 (1981). The testimony presented at the hearing and summarized above clearly demonstrates that this test was met, and OSM's assertions to the contrary do not withstand analysis.

To support its assertion that two engineers agreed that removal of the coal was "desireable [sic], perhaps even necessary, from a cost standpoint, but not necessarily required from an engineering standpoint" (Brief at 24; (emphasis in original)), OSM cites King's testimony on pages 306 through 309 of the transcript. At that point of his testimony, King had outlined three strictly engineering reasons for extracting the coal, and was explaining his fourth reason. That reason was cost. In that context, King outlined what could be accomplished (in terms of constructing a sound waste storage facility), given certain financial restraints and regulatory prerequisites. He stated:

By removing the coal seam, you create more volume. And when you're paying \$250,000 an acre, under the new regulations, just for the liner system, plus any engineering or related costs, it's imperative to maximize the capital expenditure. And so by removing the coal, more volume was created; the life of that capital is further justified.

(Tr. 306-07).

King was next asked by counsel whether he thought it would have been economically feasible to fill the voids in the coal seam. He responded in the negative, stating his opinion that "we would have encountered permitting difficulties with the Department of Waste Management in that regard." Counsel then asked King whether he could stabilize a mined coal seam "sufficient so that you would not be concerned about stability factors or liner failure later?" Only the last sentence of his response was quoted in OSM's brief. His full response was:

With an unlimited budget, I believe we could. But you've got to do, and in particular in this case, you've got to do what's practical and feasible. And in this particular case I don't think the financial resources were there to implement a design that could cope with the subsid[e]nce issue.

(Tr. 307-08). In response to a subsequent question, King emphasized this point by stating that given "unlimited financial resources" he could "design a landfill most any way" (Tr. 314). By ignoring the hypothetical nature of the colloquy, the Virginia regulation cited by King (prohibiting the placement of solid waste on unstable foundations), and King's three other reasons for finding coal removal necessary, OSM seeks to have this Board examine an engineering necessity in an economic vacuum, that is, to have us find that there is no engineering necessity if the project could be executed in another manner assuming the governmental agency had unlimited funding. A county government's pocket is not so deep that engineering design can be undertaken by the county administrators with absolute disregard of economic reality.

Superfesky's testimony was cursory and he admitted that he lacked expertise in landfill design and construction. Judge Torbett properly accorded his evidence less weight than that given to Clisso and King (Decision at 15).

The testimony of Clisso and King, both engineers, amply supports the conclusion that, from an engineering standpoint, it was necessary to remove the coal incidental to enlarging the landfill. OSM argues that all their engineering reasons for removing the coal are no more than justifications which fail to meet the regulatory test. We do not agree. OSM presented nothing to refute Clisso and King's testimony. Both concluded that it was necessary to remove the coal incidental to landfill enlargement and gave a reasoned foundation for that conclusion. Neither testified that it was not necessary to remove the coal to complete the project.

The evidence as a whole shows that the landfill expansion was in furtherance of public health and safety concerns, and the coal extraction was incidental to the County's landfill construction.

[2] The regulation requires 50 percent or more of the cost of the project to be funded by a government-financing agency's budget or general revenue bonds, but not agency guarantees, insurance, loans, funds obtained through industrial revenue bonds, or in-kind payments (30 CFR 707.5). We find the facts support Judge Torbett's conclusion that this financing criterion was met.

OSM alleges that the payments to Victor were in-kind. This allegation is contradicted by the contract terms setting out the basis for the payments to Victor (App. Exh. 3). Victor was also reimbursed for the costs it incurred (plus 15 percent) when carrying out a number of operations not connected with coal removal. The coal belonged to the County. ^{6/} The revenues derived from its sale were paid to the County and became County

^{6/} Our source for this finding is the phrase in Exh. R-4 "county-owned coal." See also Tr. 53-54.

government funds. 7/ No other source of financing is indicated by the record, and the project met the 50-percent funding criterion. 8/

We need not address OSM's assertions that the scope of the project should be narrowly, rather than broadly, construed when applying the term "construction" found in the regulation. The significant question -- whether construction of the landfill was government financed -- is answered in the affirmative. When Sullivan stated that finger ridge removal would not have been feasible without the coal revenues recovered, he was not addressing the landfill enlargement project as a whole. The revenues from the coal removed from the finger ridge were clearly insufficient to fund the landfill enlargement project. This case is readily distinguishable from Concord Coal Corp., supra, 3 IBSMA at 99, 88 I.D. at 460, on the facts. In that case, coal revenues would "ultimately constitute the predominant source of compensation for the airport construction."

The appropriations procedure for this project was clearly set out in the DMLR Commissioner's letter quoted supra (Exh. R-4). The Commissioner explained that, because of the great cost of the project, monies were not appropriated in advance, but were budgeted over several years. Further, the letter notes that the coal was owned by the County, that the revenues derived from coal sales went into the County general revenue funds and that public monies, approved by the County Board of Supervisors, were used to pay Victor for the landfill work. These statements of fact were corroborated by Henry Vanover's testimony and remain uncontradicted.

The record clearly indicates that the County Board of Supervisors was comprised of local residents accustomed to solving problems as economically and as simply as possible. The approach they took for funding the landfill may not have been the one preferred by a team of sophisticated certified public accountants, and, in hindsight, might be interpreted as having violated a state law regarding county budgetary procedures. However, that determination is beyond the purview of this Board. 9/ If, as OSM alleges,

7/ In Concord Coal Corp., 3 IBSMA 92, 88 I.D. 456 (1981), the coal extracted during the course of airport construction was not owned by the airport authority (the local governmental body that contracted to have the coal removed and airport facilities constructed), and proceeds from the sale of the coal could not be characterized as government funds. 3 IBSMA at 99, 88 I.D. at 459-60.

8/ Even if the \$501,289.93 paid to Victor are considered to be non-government funds, the remaining construction expenses (paid and budgeted) exceed that amount, satisfying the 50-percent criterion.

9/ For example, we would expect that, for something that can be as complex as the identification and classification of civil agency expenditures, it would be far more reliable to seek definitions from fiscal accounting standards than Black's Law Dictionary. In cases like this one, the Department is entitled to rely on the reasoned analysis of its experts in the field in matters within their realm of expertise. Fred Wilkinson, d.b.a. Miller Creek Mining Co., 135 IBLA 24 (1996); King's Meadows Ranches, 126 IBLA 339, 342 (1993), and cases there cited. In this case the only party in

the County budgeting and appropriation procedures are contrary to Virginia fiscal statutes, OSM is not charged with the enforcement of Virginia's fiscal laws. 30 CFR 707.5 simply requires a showing that the funding came from an "agency's budget" and proscribes several other named sources of funding.

To the extent that OSM asserts that Victor did not establish that the County had funded more than 50 percent of the construction, we find ourselves in substantial agreement with Judge Torbett's analysis of this question (see Decision at 18) and reject the assertions OSM has advanced on appeal for the reasons Judge Torbett stated in his decision.

Finally, we turn to Honeycamp's argument that coal mining operations were not incidental because they were conducted outside the boundaries of the construction project and no new permit had been obtained. Under 30 CFR 707.5 coal must be extracted "from within the boundaries of the area" directly affected by the government-financed construction project. The record shows that the finger ridge was within boundaries of the existing permit, although it had not been designated as a waste disposal area. A permit from the Virginia Department of Waste Management regulations for deposition of waste material was not required, nor could it have been obtained prior to removal of the coal. The requisite amendment of the County's existing permit to allow waste disposal in that area was to be obtained during Phase 3 of the project. The "boundaries" requirement had been met (Tr. 77-78, 249, 301).

Judge Torbett properly found the removal of the coal at the Honeycamp landfill incidental to the extension of that landfill and exempt from SMCRA. To the extent not discussed herein, OSM's other arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

I concur:

James L. Burski
Administrative Judge

fn. 9 (continued)

the field who appears to have any expertise regarding how a county budgets for wastefill projects is the Commissioner of DMLR, whose letter is quoted in the text above.

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

Henry Vanover, administrative assistant to the Board of Supervisors of Dickenson County, Virginia, acknowledged that the county did not want to get a surface mining permit in conjunction with expanding its landfill. 1/

Wanting to avoid getting a permit under the Surface Mining Act is just as legitimate as wanting to avoid paying income tax. Both goals have to be achieved in compliance with the law, however.

The provisions of the Surface Mining Act do not apply to "the extraction of coal as an incidental part of Federal, State or local government-financed highway or other construction under regulations established by the regulatory authority." 30 U.S.C. § 1278(3) (1994).

The regulations established by the Office of Surface Mining provide that coal extraction that is an incidental part of government-financed construction is exempt from the Surface Mining Act. 30 CFR 707.11(a). "Government-financed construction" is defined as "construction funded 50 percent or more by funds appropriated from a government financing agency's budget * * * (emphasis added)." 30 CFR 707.5.

In my view, Dickenson County did not comply with the regulations governing when coal extraction is exempt from the Surface Mining Act because the construction was not funded 50 percent or more by funds appropriated from the county's budget.

Under Virginia law, the head of each county department is to submit to the county's governing body by April 1 an estimate of the amount of money needed during the ensuing fiscal year for that department. The county's governing body is to "prepare and approve a budget for informative and fiscal planning purposes only, containing a complete itemized and classified plan of all contemplated expenditures and all estimated revenues and borrowings * * * for the ensuing fiscal year * * *." Code of Virginia, § 15.1-160.

1/ Question by J. Niklas Holt, counsel for the Office of Surface Mining: "Evidently, from what you've said, between you and the county attorney and the Board of Supervisors, the county had come to a conclusion, in that time period of one to three months before the first discussion with Victor [Contracting], that it would be self-defeating, as you put it, to get a surface mining permit. Am I understanding you correctly?

"[Henry Vanover]: We felt that it would. You know, based on our understanding of what we would have to do, as far as if we were to treat it as a, you know, as a surface mining operation; that we would have had to have reclaimed it, put the highwall back and so forth, and that wasn't what we were wanting. We needed the space and the dirt, and it just didn't seem to make much sense to us to proceed that way." (Tr. 269).

Opposite each item of the contemplated expenditures the budget shall show in separate parallel columns the aggregate amount appropriated during the preceding fiscal year, the amount expended during that year, the aggregate amount appropriated and expected to be appropriated during the current fiscal year, and the increases or decreases in the contemplated expenditures for the ensuing year as compared with the aggregate amount appropriated or expected to be appropriated for the current year.
[Emphasis supplied.]

Id. § 15.1-161.

A budget may include a reasonable reserve for contingencies. Id. § 15.1-161.1. The governing body shall approve the budget no later than July 1, the beginning of the fiscal year, after publishing a synopsis of it and holding a hearing. Id. §§ 15.1-159.8, 15.1-160, 15.1-162.

"No money shall be paid out or become available to be paid out for any contemplated expenditure unless and until there has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditure by the governing body * * * ." Id. § 15.1-162. A county may amend its budget "to increase the aggregate amount to be appropriated during the current fiscal year as shown in the currently adopted budget as prescribed by § 15.1-161." Id. § 15.1-162.1.

Ira Sullivan, chairman of the Dickenson County Board of Supervisors, acknowledged that expenditures, but not appropriations, were made for expanding the landfill:

[Niklas Holt, counsel for OSM]: How does the budget cycle work there in Dickenson County?

[Sullivan]: From June to June.

[Holt]: So the budget applies from July 1 to June 31 [sic]?

[Sullivan]: Let's see, was it June 31 or -- yeah.

[Holt]: And is the budget normally approved by the board for the whole year - -

[Sullivan]: Right.

[Holt]: Sometime prior to the beginning of that year?

[Sullivan]: Right. Yeah, we approve it before the beginning of the year.

[Holt]: And is that called an appropriated budget, the budget that's approved prior to the beginning of the year?

[Sullivan]: What do you mean by appropriated budget?

[Holt]: Well, how do you understand that to work? What do you understand an appropriated budget is?

[Sullivan]: Appropriated budget, we'd first see what funds we have, of course, and work out our budget. And of course we set out tax rates, you know. * * *

[Holt]: I've got a couple of printouts. It says "Dickenson County Expenditure Summary."

[Sullivan]: Mm-hmm.

[Holt]: 7/1/90 to 12/31/90. Six-month, I guess. And there's various descriptions here of, like, salaries and wages; this is under the solid waste account. And there's some certain budget amount and so forth. FICA, advertising, different categories.

[Sullivan]: Right.

[Holt]: Are there budget amounts set by the board, or at least approved by the board?

[Sullivan]: They're approved by the board, but I mean sometimes, I mean they're overspent at different categories, of course. But yeah. * * *

[Holt]: Was there any amount in the appropriated budget for this removal of the ridge and extension of the landfill, for the year that it was done?

[Sullivan]: I don't know. I don't know whether it was approved in the budget, but we did know we had problems out there and that we were going to have to have extra dirt, you know, to cover with. And it's pretty hard, I mean, we have to set a budget up, but it's pretty hard to come up with a[n] exact figure of what each one of these departments like this would cost you, you see. We didn't know. * * *

[Holt]: When this contract was entered into in March of '89, did the county appropriate money to pay the contract for the removal of the ridge by Victor Corporation?

[Sullivan]: I don't think they did. Other words, we paid for that, we was going to pay for that from what coal we got. You know, from what we'd sell it at.

[Holt]: Is that the only way the county could have done it, at that time?

[Sullivan]: At that time, that's the only way I see that we could have. I mean you may could borrow it, but that wouldn't be legal, you know. You'd have to pay off by the end of the year, you know; of the fiscal year.

(Tr. 175-78).

* * * * *

[Holt]: Now, can I borrow this [referring to Exh. A-17]?

[Sullivan]: Yes.

[Holt]: Did you have this prepared, sir?

[Sullivan]: Yes, I did.

[Holt]: And at the top, is this from some official county record, or was this just prepared [for] this case?

[Sullivan]: Yeah, from the bills that we paid out on this. I had my staff to prepare it from --

[Holt]: For this case?

[Sullivan]: Yeah, for the expenditure. Yes, uh-huh.

[Holt]: And at the top it says, "Funds appropriated to the Dickenson County landfill for renovation of the landfill and handling of cover material."

[Sullivan]: Right.

[Holt]: Who wrote that?

[Sullivan]: I guess my staff did. I had them to prepare it.

[Holt]: Was that accurate, sir, that all these are funds appropriated to the landfill?

[Sullivan]: Well, that was actually expenditures. We had to spend it.

[Holt]: Right. But as far as being appropriated to the landfill, is that accurate?

[Sullivan]: Well, they were expenditures we incurred. I mean I don't know exactly whether all of it was appropriated or not. I mean a lot of times we'd spend, you know, some that's not appropriated. We have to, you know.

[Judge Torbett]: Your act of approving the bills later, do you consider that appropriation?

[Sullivan]: Not altogether.

[Judge Torbett]: Okay. Well, it's a matter of law anyhow.
[Emphasis supplied.]

(Tr. 181-83; see Tr. 184-85).

Henry Vanover, the Board of Supervisors' principal administrative employee who supervises the operation of all county departments and the county budget (Tr. 241), also testified that no appropriations were made for the project carried out by Victor Contracting, Inc.:

[Holt]: Now, how does the county spend funds on the landfill, and how did they pay the amounts that you've stated have been paid?

[Henry Vanover]: Well, funds are expended by the Board of Supervisors for various [sic], and not just the landfill. I mean it would be the same for basically all departments, all categories of the budget. The Board of Supervisors appropriates funds for that department. They issue a warrant for the expenditure of funds based on invoices that come in. That is presented to the treasurer of the county, who endorses that warrant and converts it into a negotiable check, and the bills are paid.

[Holt]: And is this the same for virtually all expenditures?

[Vanover]: Yes.

[Holt]: How often does the Board of Supervisors do this?

[Vanover]: The board meets once a month, on a regular basis. It occasionally would have a special meeting or something between times, but generally speaking, the board meets once a month.

[Holt]: And are the bills then presented to it for its approval?

[Vanover]: That's correct. At the meeting, the supervisors receive a -- what they receive is a computer-generated checklist that represents the proposed payments for invoices that have been received. Of course the invoices are received by my office and are approved or disapproved, as the case may be * * *. And then based on that, the checklist is generated. The supervisors, they review that checklist, they review invoices, if they wish. They,

based upon that review, then appropriate the funds and authorize the approval of the proposed expenditures, and we pay the money.

There are occasions when payments may be made on something between board meetings. That is done with the approval of the Board of Supervisors, however.

[Holt]: In those cases, do they then approve those expenditures at the next board meeting?

[Vanover]: They do. * * *

(Tr. 252-53).

* * * * *

[Holt]: Does Dickenson County approve its annual budget prior to the beginning of its fiscal year, each year?

[Vanover]: That's correct.

[Holt]: So the July 1st of '88 through June 30th of '89 budget would be approved prior to July 1st of '88. Is that correct?

[Vanover]: It's supposed to be, by law, yes.

[Holt]: Were payments made, during that fiscal year, to Victor Contracting?

[Vanover]: July 1, '88, through June 30th, '89? I suspect they were. I would have to, I guess, go and look and see, but they began, I believe, in March or April of that year, so I suspect we made payments before the end of June, to them.

[Holt]: Did the budget for that fiscal year include any specific accounts for payment of the Victor Contracting contract?

[Vanover]: I'm not sure I understand your question.

[Holt]: Did the budget approved for that fiscal year, of July 1st of '88 through June 30th of '89, include any specific amount for payments to Victor Contracting under the contract they entered into with the county on March 30, 1989?

[Vanover]: The budget for that year would have contained money in various line items, such as capital outlay, for use for whatever purposes, one of which could have been the payment to Victor Contracting. If your question is, was there a line item with X dollars that said Victor Contracting, no. [Emphasis supplied.]

(Tr. 276-77).

In a May 21, 1990, letter to OSM, the Commissioner of the Virginia Division of Mined Land Reclamation (DMLR) responded to OSM's view that Dickenson County's project was not exempt:

The coal on the landfill was not removed on a mere whim. The coal was removed as a necessary part of maintaining and bringing the county landfill into compliance with Virginia Landfill Regulations. Monies for this project were not appropriated up-front because according to the County Administrator, the cost is so high that it has to be budgeted over several fiscal years.
* * * [2/]

With respect to the funding issue, public funds from general revenues have been appropriated for this project. * * *

The issue seems to be that a specific allocation does not appear in the county budget for this work. However, public monies from Dickenson County general revenues have, in fact, been used to pay the contractor to improve the County landfill. Payment to Victor Contracting was approved by the Dickenson County Board of Supervisors, otherwise no monies would have been tendered by the County to the contractor.

(Exh. R-4 at 2-3).

Judge Torbett acknowledged in his decision "that the County never formally budgeted the funds by voting on them in the previous year" (Decision at 18). Nevertheless, he held:

[T]here was ample testimony that the County followed its normal appropriations procedure in presenting the bills for the Board's approval and in that fashion the funds were appropriated from the County's budgeted funds for the year. * * * [T]he bills were promptly paid by the County as they came due.

Id. at 19.

What an appropriation is, as Judge Torbett said at the hearing, is a matter of law, and as a matter of law I cannot agree that the Dickenson County Board of Supervisors' practice of paying the bills Victor Contracting submitted constitutes an appropriation of funds under Virginia state law. No estimate of the expenditures needed for expanding the landfill in the 1988-89 fiscal year was made for the Board of Supervisors.

The Board did not include an item for these expenditures in its 1988-89 fiscal year budget. The Board did not amend that budget in anticipation of making payments under the March 30, 1989, contract with Victor Contracting. It

2/ Ira Sullivan also testified that the county could not budget for expenditures outside the current fiscal year (Tr. 170).

did not adopt resolutions or ordinances making appropriations for those payments. It simply approved proposed expenditures to Victor Contracting based on the hourly-rate bills Victor Contracting submitted. Approving expenditures from the general fund is not the same as appropriating funds in the budget.

Sections 15.1-161 and 15.1-162.1 of the Virginia law clearly provide for a system of budgeting on a past-year/present-year/next-year fiscal year basis for governmental programs and projects of indefinite duration; of appropriating amounts and making expenditures from those amounts; and of amending the budget from time to time to increase the amounts appropriated when needed. Thus, the Dickenson County view that it could not budget for expenditures outside the current fiscal year, repeated in the DMLR Commissioner's May 21, 1990, letter to OSM quoted above, is mistaken. Neither Vanover nor the DMLR Commissioner, in saying the county "appropriated" funds for the landfill expansion project, is employing the term in accordance with Virginia law.

Thus, the county's procedure does not conform with the requirement of the definition in 30 CFR 707.5 that government-financed construction must be funded by funds "appropriated from a government financing agency's budget."

This conclusion is consistent with the other provisions of the regulations governing the exemption for coal extraction incident to government-financed construction. In the proposed regulations, the Department of the Interior provided that the government financing agency would notify the regulatory authority in advance of any coal extraction that was an incidental part of government-financed construction and inform it of "[t]he kind and amount of the government financing." See proposed 30 CFR 707.12(b)(3), 43 FR 41809 (Sept. 18, 1978). In the final regulations the notification requirement was dropped but operators of government-financed construction projects that involve incidental extraction of coal are required to have information at the site that includes "[t]he government agency which is providing the financing and the kind and amount of public financing." 30 CFR 707.12(c). This provision of the regulations corresponds to the requirement in the definition of "government-financed construction" that funds be appropriated in a government financing agency's budget in advance, not simply expended by the agency as the project progresses, for otherwise it would not be possible for the construction operator to have information available at the site about the kind and amount of public financing. (Nor would it have been possible for the government financing agency to notify the regulatory authority in advance under the requirement in the proposed regulation.)

In addition, this reading of the definition is consistent with the policy foundation of the regulation. Indirect means of government assistance such as guarantees, insurance, loans, funds obtained through industrial revenue bonds, or in-kind payments are excluded from the definition of government-financed construction in order to assure that the agency has "a direct and significant interest in the ultimate success and utilization of the construction project." 43 FR 41673 (Sept. 18, 1978). Requiring

that government-financed construction entail the use of "funds appropriated from a government financing agency's budget" is also a means of assuring the agency's direct interest in the construction project by causing it to formally approve a budget and appropriate monies for that project.

The majority says "[t]he record clearly indicates that the County Board of Supervisors was comprised of local residents accustomed to solving problems as economically and simply as possible" (Majority Opinion at 12).

This is a nice rhetorical device, but it has nothing to do with the issue.

What is clear from the testimony set forth above is that both Ira Sullivan, chairman of the County Board of Supervisors, and Henry Vanover, the board's professional county administrator, were aware that paying Victor Contracting for the work of expanding the landfill from revenues generated by the sale of the coal was not the same as making expenditures from appropriated funds. That is the issue, not whether their approach to funding the expansion of the landfill would be "preferred by a team of sophisticated certified public accountants" or whether it "violated a state law" (Majority Opinion at 12). Of course it is "beyond the purview of this Board," *id.*, to determine whether or not Dickenson County violated state law. It is certainly not beyond either the purview or, I would hope, the disposition of this Board to determine whether the county followed the provisions of state law described above.

It is our responsibility to decide whether the expansion of the landfill was funded by "funds appropriated from a government financing agency's budget." It should not be necessary to consult "fiscal accounting standards," (Majority Opinion at 12, n.9), to decide whether the county appropriated funds from its budget to fund this project. The basic concepts of appropriation and expenditure are not "complex." *Id.* They have been around at least since the drafting of the Constitution. See U.S. Constitution, Article 1, section 9, clause 7. They are explained in any high school civics or college political science textbook. They are defined in standard dictionaries.

Such a definition was employed by the Supreme Court of Virginia. It said "to appropriate" means "[t]o set apart for, or assign to, a particular purpose or use, in exclusion of all others," and "appropriation" means "[m]oney set apart by formal action to a specific use." *Almond v. Day*, 197 Va. 419, 426, 89 S.E. 2d 851, 856 (1955). The Supreme Court of Virginia was quoting Webster's New International Dictionary, Second Edition (1949). If confirmation by legal authorities is necessary, it is readily available. ^{3/}

^{3/} "The word 'appropriation' has been defined as the designation or authorization of the expenditure of public moneys and stipulation of the amount, manner, and purpose for a distinct use or for the payment of a particular demand, or the setting apart from the public revenue of a definite sum of money for the specified object in such a manner that the officials of the government are authorized to use the amount so set apart,

Of course "the Department is entitled to rely on the reasoned analysis of its experts in the field in matters within their realm of expertise" (Majority Opinion at 12, n.9). But the expert the majority relies on is not a Departmental expert, it is the Commissioner of the Virginia Department of Mined Land Reclamation, defending his Department against OSM's 10-day notice concerning the Dickenson County project -- hardly the context for objective expert evaluation. And even the Commissioner acknowledged that "monies for this project were not appropriated up-front."

No, "OSM is not charged with the enforcement of Virginia's fiscal laws" (Majority Opinion at 13). It is, however, charged with oversight of the Virginia State program, and in that context it is responsible for deciding whether Dickenson County was properly exempt from obtaining a permit for surface mining of coal in conjunction with expanding its landfill. That decision rests on whether the project was funded 50 percent or more by funds appropriated from Dickenson County's budget. The evidence shows Dickenson County made no appropriations for this project. Rather, it put revenues from the sale of the coal Victor Contracting mined into its general fund and paid Victor Contracting's bills from the general fund when they were submitted. That might be convenient, but it is not an appropriation within the meaning of the law.

I would hold that Victor Contracting has not shown its activities were exempt under 30 U.S.C. § 1278(3) (1994). See Wilder Coal Co. v. OSM, 112 IBLA 107, 114 (1989).

I dissent.

Will A. Irwin
Administrative Judge

fn. 3 (continued)

and no more, for that object. It has also been defined as an authority of the legislature, given at the proper time and in legal form to the proper officers, to apply a distinctly specified sum from a designated fund out of the treasury, in a given year, for a specified object or demand against the state." 63A Am. Jur. 2d Public Funds § 36 (1984).

An appropriation is distinct from an expenditure. The former is a setting aside or assignment by the legislature of a specified amount of money to a particular person or use; the latter is the act of "expending, a laying out of money, disbursement. Grout v. Gates, 124 A. 76, 80, 97 Vt. 434; Suppiger v. Eniking, 60 Idaho 292, 91 P.2d 362, 364, 365" (Idaho 1939). Black's Law Dictionary, Fourth Edition, at 131 (1951).